(6)

FILED
JUN 13 1994
OFFICE OF THE CLERK

No. 93-6892

In the Supreme Court of the United States

OCTOBER TERM, 1993

MATTHEW WAYNE TOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

56 pp

QUESTION PRESENTED

Whether out-of-court statements made by a child sexual abuse victim who testified at trial were properly admitted under Federal Rule of Evidence 801(d)(1)(B).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Rule involved	1
Statement	2
A. A.T.'s out-of-court statements	2
B. Trial proceedings	6
C. Appellate proceedings	11
Summary of argument	14
Argument:	
I. Prior consistent statements offered to rebut a charge of improper influence or motive may be admitted without a showing that the statements were made before the influence or motive arose	16
A. Rule 801(d)(1)(B) does not contain a pre-motive rule of admissibility	16
B. A pre-motive rule would be contrary to the overall thrust of the Federal Rules of Evidence and is not necessary to prevent abuses suggested by petitioner	28
C. The antecedents of Rule 801(d)(1)(B) do not warrant the conclusion that it incorporates a pre-motive rule	33
II. The district court properly admitted A.T.'s prior consistent statements	46
Conclusion	49

TABLE OF AUTHORITIES

Cases:

Bourjaily v. *United States*, 483 U.S. 171 (1987)	19, 20
Brookbank v. *State ex rel. Murphy*, 55 Ind. 169 (1876)	39
Castenada v. *Partida*, 430 U.S. 482 (1977)	24-25
City of New York v. *Pullman Inc.*, 662 F.2d 910 (2d Cir. 1981), cert. denied, 454 U.S. 1164 (1982)	33
Commonwealth v. *Jenkins*, 76 Mass. 485 (1858)	27
Commonwealth v. *Wilson*, 67 Mass. 337 (1854)	27

Cases—Continued: Page

Conrad v. *Griffey*, 52 U.S. (11 How.) 480 (1850) 34, 36, 37
Copes v. *United States*, 345 F.2d 723 (D.C. Cir. 1964) ... 43
Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) 28, 29
Ellicott v. *Pearl*, 35 U.S. (10 Pet.) 412 (1836) 34, 35
Garcia v. *Watkins*, 604 F.2d 1297 (10th Cir. 1979) 27
Hanger v. *United States*, 398 F.2d 91 (8th Cir. 1968), cert. denied, 393 U.S. 1119 (1969) 42, 43
Henderson v. *Jones*, 10 Serg. & Rawle 322 (Pa. 1823) 39
Houston & T.C. Ry. v. *Fox*, 166 S.W. 693 (Tex. 1914) 27
Lanasa v. *State*, 71 A. 1058 (Md. 1909) 27
Lutterell v. *Reynell*, 1 Mod. Rep. 282 (1670) 34
Lyke v. *Lehigh Valley R.R.*, 84 A. 595 (Pa. 1912) 27
McClellan's Estate, In re, 111 N.W. 540 (S.D. 1907) 39
People v. *Duvall*, 68 Cal. Rptr. 708 (Cal. Ct. App. 1968) 25-26
People v. *Gentry*, 76 Cal. Rptr. 336 (Cal. Ct. App. 1969) 27
People v. *Walsh*, 301 P.2d 247 (Cal. 1956) 27
State v. *George*, 30 N.C. 324 (1848) 39
State v. *Kane*, 75 A.2d 894 (N.J. Super. Ct. App. Div. 1950) 26
State v. *Wolf*, 245 P.2d 1009 (Wash. 1952) 27
Stewart v. *People*, 23 Mich. 63 (1871) 34, 38, 39
Sweazey v. *Valley Transport, Inc.*, 107 P.2d 567 (Wash. 1940) 39
Tompkins v. *Erie R.R.*, 90 F.2d 603 (2d Cir. 1937), rev'd, 304 U.S. 64 (1938) 27
United States v. *Bays*, 448 F.2d 977 (5th Cir. 1971), cert. denied, 405 U.S. 957 (1972) 42
United States v. *Bowman*, 798 F.2d 333 (8th Cir. 1986) .. 45
United States v. *Brennan*, 798 F.2d 581 (2d Cir. 1986) 45
United States v. *Carswell*, 922 F.2d 876 (D.C. Cir. 1991). 33
United States v. *Gandy*, 469 F.2d 1134 (5th Cir. 1972) 43

Cases—Continued: Page

United States v. *Harris*, 761 F.2d 394 (7th Cir. 1985) 45
United States v. *Henderson*, 717 F.2d 135 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984) 25
United States v. *Marchand*, 564 F.2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) 45
United States v. *Miller*, 874 F.2d 1255 (9th Cir. 1989) 20
United States v. *Montague*, 958 F.2d 1094 (D.C. Cir. 1992) 31
United States v. *Parodi*, 703 F.2d 768 (4th Cir. 1983) 45
United States v. *Parry*, 649 F.2d 292 (5th Cir. 1981). 21
United States v. *Porter*, 544 F.2d 936 (8th Cir. 1976) 45
United States v. *Rubin*, 609 F.2d 51 (2d Cir. 1979), aff'd, 449 U.S. 424 (1981) 45
United States v. *Salerno*, 112 S. Ct. 2503 (1992) 17
United States v. *Sampol*, 636 F.2d 621 (D.C. Cir. 1980) .. 20
United States v. *Zito*, 467 F.2d 1401 (2d Cir. 1972) 43
Waller v. *People*, 70 N.E. 681 (Ill. 1904) 39
Western Indus. v. *Newcor Canada Ltd.*, 739 F.2d 1198 (7th Cir. 1984) 19

Constitution, statutes and rules:

U.S. Const. Amend. VI (Confrontation Clause) 13
18 U.S.C. 1153 2
18 U.S.C. 2241(c) 2
18 U.S.C. 2245(2)(A) 2
18 U.S.C. 2245(2)(B) 2
Fed. R. Evid.:
Art. IV 30
Rule 401 ..... 15, 16, 28, 29, 30, 31, 33, 37
Rule 401 advisory committee's note 22, 29
Rule 402 18
Rule 403 ..... 32, 33, 41
Art. VI 45
Art. VIII 30, 45
advisory committee's note 17
Rule 801 ..... 10, 43, 45
Rule 801 advisory committee's note 35

Rules—Continued: Page

Rule 801(d) 1
Rule 801(d)(1) 2, 43, 45
Rule 801(d)(1)(A) 44, 45
Rule 801(d)(1)(B) ..... *passim*
Rule 801(d)(1)(B) advisory committee's note 44
Rule 801(d)(2)(E) 19, 20
Rule 803 ..... 9, 10
Rule 803(3) 9
Rule 803(4) 9, 10, 11
Rule 803(24) 8, 10, 11
Rule 806 37

Miscellaneous:

American Law Institute, Model Code of Evidence (1942) 40, 41
Black's Law Dictionary (6th ed. 1990) 21
M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*:
140 A.L.R. 21 (1942) 26
75 A.L.R.2d 909 (1961) 26
Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. Rev. 43 (1954) 40
4 D. Louisell & C. Mueller, *Federal Evidence* (1980) 25, 27
C. McCormick, *Law of Evidence* (1954) 40
C. McCormick, *McCormick on Evidence* (2d ed. 1972) 17
J. Maguire, *Evidence: Common Sense and Common Law* (1947) 40
Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948) 40
Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1 (1937) 40
National Conference of Commissioners on Uniform State Laws, Uniform Rules of Evidence (1953) 41
Webster's Third New International Dictionary (1986) 22
Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961) 31, 40

Miscellaneous—Continued: Page

J. Weinstein & M. Berger, *Weinstein's Evidence* (1993):
Vol. 3 ..... 26, 42, 43
Vol. 4 ..... 17, 44
Wheaton, *What Is Hearsay?*, 46 Iowa L. Rev. 210 (1961). 40
3 J. Wigmore, *Evidence* (3d ed. 1940) 40
4 J. Wigmore, *Evidence* (Chadbourn rev. ed. 1972) 26, 27, 36
Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437 (1904) 34

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-6892

MATTHEW WAYNE TOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 21-41) is reported at 3 F.3d 342.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. The petition for a writ of certiorari was filed on November 24, 1993, and was granted on February 22, 1994, limited to the first question presented in the petition. J.A. 42. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part as follows:

A statement is not hearsay if—

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of aggravated sexual abuse of a child, in violation of 18 U.S.C. 1153, 2241(c), and 2245(2)(A) and (B). He was sentenced to 144 months' imprisonment. The court of appeals affirmed. J.A. 21-41.

A. A.T.'s Out-Of-Court Statements

The evidence at trial showed that, in June 1989, petitioner, a Navajo Indian, sexually assaulted his then four-year-old daughter, A.T., by placing his penis in her genitals and mouth, by placing his fingers in her genitals, and by having contact between his mouth and her vulva. The assault took place on an Indian reservation while petitioner had custody of the child.

Petitioner and his wife, Beverly Padilla, were divorced in September 1988. The parents were originally awarded joint custody of A.T., with petitioner having primary physical custody, and Padilla having visitation rights and custody on weekends and holidays. Petitioner and Padilla had continuing disputes over custody, and beginning in June 1989, petitioner and Padilla alternated two-week periods of custody of

A.T. J.A. 21-22; VI-A Tr. 395, 398, 409-420, 464, 528-530.

The assault occurred during June 1989, while A.T. was staying with petitioner in Mitton Rock, New Mexico. Petitioner undressed A.T. and himself. A.T. tried to cross her legs, but petitioner forced them apart. Petitioner then climbed on top of A.T. and penetrated her vagina with his penis. He also put his penis in A.T.'s mouth. After petitioner finished, A.T. went to the bathroom and wiped blood from her vaginal area. J.A. 22-23; IV Tr. 83-84, 88-90, 93-94.

A.T. did not tell her mother of the attack until more than a year later, when A.T. was living with her mother and her mother's new husband in Colorado under a modified custody order. A custody review hearing was scheduled for August 24, 1990, in Shiprock, New Mexico. On August 22, the day before the family was going to drive to Shiprock, A.T. said to her baby-sitter, Lisa Rocha, "Please don't let my mom take m[e] back to my father." J.A. 11. When Rocha asked why, A.T. responded, "Because my father gets drunk and he thinks I'm his wife." J.A. 12. Because Rocha was preoccupied with her own child at the time, she did not immediately appreciate the significance of A.T.'s words. After a few minutes, Rocha asked A.T. what she meant, but A.T. would not talk to her. J.A. 24; V Tr. 219.

Padilla and A.T. missed the custody hearing because it had been rescheduled. On August 26, Rocha telephoned Padilla, told her what A.T. had said, and asked her to find out what A.T had meant. Rocha telephoned Padilla again the next morning and urged her to speak to A.T. A.T. refused to speak to Padilla, however, so Padilla asked Rocha to come to Padilla's

house and talk to A.T. V Tr. 220-222; VI-A Tr. 406-407.

When Rocha arrived, Padilla went into another room, turned her back to A.T. and Rocha, and listened. Rocha asked A.T. what she had meant about her father treating her like a wife. A.T. answered that petitioner did "nasties" to her. Rocha asked her to explain. A.T. told Rocha that petitioner had dragged her by the arms into the bedroom, taken off her clothes, and put her on the bed. Although she had tried to keep her legs crossed, petitioner had forced them open. A.T. then said that petitioner had lain on top of her, and she had gotten a sharp pain "down there," in her abdomen. A.T. also said that she had wiped herself afterwards and there was blood on the tissue. J.A. 12; V Tr. 222-223; VI-A Tr. 407-408.

Rocha and Padilla contacted the police. On August 29, Child Protection Services caseworker Kae Ecklebarger interviewed A.T. Ecklebarger asked A.T. if she knew why she was there; A.T. replied because of what "Matthew" had done to her. V Tr. 317. A.T. said that petitioner had "put his balls" in her. Ecklebarger asked A.T. if she could remember one specific time. A.T. said she could remember one time especially clearly. She said that her father had told her to take off her clothes, and when she refused, petitioner removed her panties, put her on the floor, and "put his balls" in her. Ecklebarger brought out anatomically correct dolls and asked A.T. to show what petitioner had done. A.T. undressed the male doll and removed the panties from the female doll, placed the female doll on its back, put the male doll on top of it, and took the penis of the male doll and tried to insert it into the vaginal area of the female doll. She then moved the male doll up and down on the female doll. J.A. 17.

A.T. also told Ecklebarger that petitioner had kissed her all over her body, including on her vaginal area, which she indicated by pointing to the girl doll. Her father also asked her to touch him, A.T. said, but she refused. When Ecklebarger asked A.T. where her father had asked her to touch him, A.T. pointed to the penis on the male doll. A.T. further said that she went to the bathroom afterwards and wiped herself, and that there was blood on the tissue. A.T. kept the tissue and showed it to her grandmother and aunt, saying, "Look what Matthew did to me." A.T.'s grandmother confronted petitioner, who turned to A.T. and said, "It's all your fault." A.T. answered, "No, it isn't, it's all your fault." J.A. 18.

Ecklebarger referred A.T. to Dr. Karen Kuper, a local pediatrician. During Kuper's initial interview of A.T., on September 14, 1990, she asked A.T. whether anyone had ever touched her in a way that hurt or was scary. A.T. answered, "Just my dad." When Kuper asked where her father had touched her, A.T. pointed to the vaginal area on an ordinary doll in Dr. Kuper's office. A.T. also said that petitioner had "put his fingers inside me." When Kuper asked whether her father had touched her with anything else, A.T. replied, "His thing." She would not say what "his thing" was, but she pointed to the doll's genital area. Kuper asked what her father had done with his "thing"; A.T. said he had "put it inside of me," again pointing to the doll's vaginal area. J.A. 15.

On examining A.T., Kuper observed that A.T.'s vaginal opening was enlarged, and that A.T. had an abnormally thin amount of hymenal tissue for a girl of her age. Kuper concluded that the size of the vaginal opening and the small amount of hymenal tissue were

consistent with the penetration of the vagina by an object. V Tr. 259.

On September 21, 1990, A.T. saw Dr. Laura Reich, another pediatrician, for treatment of a rash on her thighs. According to Reich, A.T. "was extremely calm during the examination and very friendly." During the examination, A.T. told Reich that petitioner had put his "thing" in her. After learning that A.T. already had spoken to Child Protection Services, Reich did not question her further. J.A. 16. Reich's examination of A.T. revealed that her hymen was not intact and that her vaginal opening was abnormally large. Reich concluded that A.T. "had definitely had penile penetration in her vaginal area." V Tr. 294.

Dr. Jean Spiegel, a pediatrician and expert in child sexual abuse, examined A.T. the next year, on September 3, 1991. Spiegel found that A.T. had a very thin rim of hymenal tissue and a large hymenal opening for her age, which findings were consistent with chronic vaginal penetration. Spiegel concluded that repetitive penetration by a penis, finger, or similar object could have caused the size of A.T.'s vaginal opening. VI-A Tr. 472-473, 494, 500, 503-504, 507-508. Spiegel also spoke with A.T. outside her mother's presence. VI-A Tr. 509. A.T. told Spiegel that petitioner had touched her breasts and "front privates," as well as her bottom. J.A. 20.

B. Trial Proceedings

At trial, A.T. was the government's first witness. She was six and one-half years old at the time. The judge questioned her to determine whether she was competent to testify. IV Tr. 69-72, 78-79. On direct examination, she described petitioner's abuse through

testimony and the use of dolls, and by pointing to body parts. See IV Tr. 83-94.

A.T. was then cross-examined by defense counsel. The course of defense counsel's questioning suggested that A.T. was fabricating the allegations of abuse out of a wish to live with her mother rather than her father.[1] For example, A.T. testified, in response to defense questions, that she had nobody to play with in New Mexico, where petitioner lived, J.A. 4, and that she missed her mother when she was in New Mexico with petitioner, but did not miss petitioner when she was with her mother, J.A. 5. When asked on cross-examination what she thought would happen to her mother and to petitioner when she went to court, A.T. answered that she might be returned to petitioner, which she feared, and that her mother might go to jail. J.A. 5-6.

After the end of A.T.'s testimony, the government presented as witnesses the six persons who had heard A.T.'s out-of-court statements describing petitioner's abuse. The government argued that "in this case [the statements are] offered to rebut the inference of an improper influence or motive by this child." J.A. 6. This inference arose after the defense counsel told the jury in the opening statement that A.T. "was to give false testimony because of a custody battle," J.A. 7, and after the cross-examination of A.T., which

---

[1] Defense counsel made the same contention in her opening statement, telling the jury that "this case is about a false accusation made during a child custody case, and that's going to be the evidence that you are going to hear in this case." IV Tr. 59. Counsel also emphasized that "two days before [Padilla] was supposed to bring [A.T.] back to the tribal court custody hearing, is when this first allegation is made * * * to the babysitter." IV Tr. 62.

raised the charge that A.T. was lying because she preferred to live with her mother rather than her father, *ibid.*

To determine whether these statements were admissible, the court heard the testimony of Lisa Rocha outside the presence of the jury. See V Tr. 195-211. In that testimony, Rocha related A.T.'s statements to her, and explained how A.T. had made the August 22 statement "out of the blue," without prompting from Rocha. V Tr. 202. Rocha also explained that A.T. had refused to elaborate on her first statement, and that when Rocha asked her to explain what she had meant, A.T. "took off running again to the room to play." V Tr. 198.[2] In explaining the context of the August 27 statement, Rocha testified that she did not ask A.T. specific questions in detail about the abuse, but "just asked [A.T.] what she meant, and then she explained everything to me. I did not ask her, Did he do this, did he do that? She's the one that told me what he did." V Tr. 205-206.

After hearing this proffer, the district court admitted all of A.T.'s statements to Rocha on both August 22 and 27, including those overheard by Padilla on August 27, under Rule 801(d)(1)(B). J.A. 9, 11.[3] The court also admitted the statements made on August 22 (but not those on August 27) under Rule 803(24), the "catch-all" exception to the hearsay rule. J.A. 9.[4]

---

[2] During her testimony before the jury, Rocha also stated that she did not know that Padilla and petitioner were in the middle of a custody fight at the time. V Tr. 240.

[3] When Padilla testified later in the trial, the district court confirmed its ruling admitting the portion of A.T.'s August 27 statement overheard by Padilla. J.A. 19-20.

[4] Rule 803(24) provides that extrajudicial statements may be admitted if, among other things, the statements have "equivalent circumstantial guarantees of trustworthiness" to those of statements admissible under the other exceptions to the hearsay rule in Rule 803. The court ruled that the August 22 statement had circumstantial guarantees of trustworthiness equivalent to those that would make a hearsay statement admissible under Rule 803(3). J.A. 9. Rule 803(3) permits the introduction of an out-of-court statement "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)."

As to Rule 801(d)(1)(B), the district court agreed with the government that the defense had implicitly charged that A.T. was making up her testimony because of an improper motive, namely, her preference to live with her mother rather than her father. J.A. 9. Rocha then testified before the jury about A.T.'s statements to her describing petitioner's abuse.[5]

The government then sought to introduce A.T.'s out-of-court statement to Karen Kuper, through Kuper's testimony, under Rule 801(d)(1)(B) and Rule 803(4), the exception to the hearsay rule for statements made for purposes of medical diagnosis. The district court initially admitted the statement only under Rule 801(d)(1)(B), remarking to defense counsel that the statement would not have been so admitted unless "you hadn't thrust it in that direction, that is recent fabrication or improper motive, and that is

---

[5] Although petitioner's attorneys objected to the introduction of A.T.'s statements through Rocha's testimony as inadmissible hearsay, they did not specifically contend at trial that the statements should be excluded because they were made after the alleged motive to lie arose. Defense counsel argued to the district court that its ruling was overbroad, and that the ruling would effectively allow the admission of prior consistent statements in every case, because the charge of witness fabrication is made in every case. J.A. 10.

implied in the manner in which you conducted your examination." J.A. 14. Kuper then testified about her examination of A.T. and A.T.'s statements to her describing the abuse. J.A. 14-15. She explained that she had not asked A.T. leading questions, J.A. 15, and that Padilla had not told her what to ask A.T., V Tr. 258. On cross-examination, she further explained that, when she interviewed children about abuse, she watched for coaching from parents, V Tr. 281, and that she had not asked A.T. questions about her fear of losing her mother or going back to her father, V Tr. 282-283. After the completion of her testimony, the district court reaffirmed its admission of the statement under Rule 801(d)(1)(B) and also ruled it admissible under Rule 803(4). V Tr. 288.

The testimony by the next witness, Laura Reich, presented the same evidentiary issues as those raised by Kuper's testimony. Defense counsel renewed their objection, which was implicitly overruled by the court. J.A. 15-16. In addition to explaining her conclusions from her physical examination of A.T., Reich related A.T.'s statement that her father "had put his thing in her." J.A. 16. Reich testified that, at the time of the examination, she did not know that A.T. was involved in a custody dispute. V Tr. 302.

The government offered the testimony of Kae Ecklebarger about A.T.'s statements to her under Rule 801(d)(1)(B) and Rule 803(24). V Tr. 166, 170.[6]

[6] The court of appeals believed that the government failed to offer Ecklebarger's testimony expressly as nonhearsay under Rule 801(d)(1)(B) but nevertheless found it admissible under that Rule. J.A. 27. Although the transcript of the trial is not absolutely clear on this point, both sides plainly understood in the context of the trial that the government was offering Ecklebarger's testimony under both Rules 801 and 803. As to Rule 803(24), the government argued that A.T.'s statements to Ecklebarger, a social worker, were similar to statements made for purposes of medical diagnosis, which are admissible under Rule 803(4). As the government pointed out, A.T.'s relationship with Ecklebarger was similar to that with Kuper, in that both "help[] kids," and A.T. confided in both even though she would not tell her mother about the abuse by petitioner. V Tr. 176.

Although the court overruled defense counsel's objection to these statements, the basis for its ruling was not clear. J.A. 16. In her testimony, Ecklebarger explained that she had not asked A.T. leading questions, that Padilla had not been present during the interview, and that she and A.T. had talked about the difference between stories and things that really happened. V Tr. 315-316, 337. Ecklebarger also testified that, although she was aware at the time of the interview that A.T. was involved in a custody dispute, she believed that there was a very low incidence of false reporting of sexual abuse by children. V Tr. 338.

Finally, the government introduced testimony by the third pediatrician, Jean Spiegel, about A.T.'s statements to her. J.A. 20. Defense counsel made no specific objection on hearsay grounds to this testimony.

C. Appellate Proceedings

On appeal, petitioner argued that all of A.T.'s statements should have been excluded under Rule 801(d)(1)(B) because they were made after A.T.'s alleged motive to lie arose. The court of appeals ruled that all the statements were admissible under Rule 801(d)(1)(B), and it did not reach the question of their admissibility under Rule 803(4) or 803(24). J.A. 27.

The court of appeals first rejected petitioner's claim that A.T. was not "subject to cross-examination" concerning her prior statements about sexual abuse, as required by Rule 801(d)(1)(B). J.A. 28-31. The court concluded that, "[a]lthough A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions," and that petitioner had failed to "identify any specific topic or issue that he feels was important but about which A.T. would not respond." J.A. 31. The court of appeals also upheld the district court's ruling that petitioner had implied, through cross-examination, that A.T. had fabricated the sexual abuse allegations to remain with her mother. J.A. 32. The court noted that "[d]efense counsel questioned A.T. at length regarding her preference for living with her mother," and that A.T. testified "that she had friends in Colorado but none in New Mexico, and that she missed her mother when in New Mexico but did not miss her father when in Colorado." *Ibid.*

The court of appeals then rejected petitioner's contention that A.T.'s prior statements were inadmissible solely because they did not predate the purported motive to fabricate. The court reasoned that petitioner's argument, which asserts that statements made after a motive to lie arises have no probative value, has more to do with relevancy than with the concerns about reliability underlying the hearsay rules. See J.A. 34. In addition, the court observed, "even as a function of relevance, the pre-motive rule is clearly too broad: a per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more accurately determined

by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." *Ibid.*

The court of appeals nevertheless recognized that, in some cases, "prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar." J.A. 34. The court therefore held that, in cases involving prior consistent statements made after the alleged motive to lie arose, courts should consider whether the statement "has probative value apart from its repetition." *Ibid.* In this case, the court found that "A.T.'s consistent statements do carry probative force apart from mere repetition," J.A. 37, because A.T.'s initial statement to her baby-sitter was spontaneous, and because there was no reason to believe that A.T. had made the statements out of a "calculated scheme to deceive," or even that A.T. "possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme," J.A. 36. Given the circumstances in which A.T.'s statements were made, the court of appeals concluded that the district court had not erred in admitting those statements.[7]

This Court granted certiorari, limited to the question of the admissibility of the statements under Rule 801(d)(1)(B). J.A. 42.

---

[7] The court of appeals also rejected petitioner's arguments that the admission of A.T.'s prior statements violated the Confrontation Clause, J.A. 37-39, that the district court improperly permitted the prosecutor to use leading questions in examining A.T., J.A. 39-40, and that cumulative error required reversal, J.A. 40.

SUMMARY OF ARGUMENT

I. Federal Rule of Evidence 801(d)(1)(B) does not require the offering party to show, or the district court to find, that a testifying witness's prior consistent statement "offered to rebut [a] * * * charge against the declarant of recent fabrication or improper influence or motive" was made before the improper motive arose. The plain language of the Rule mentions nothing about the timing of the statement as a prerequisite to admission. The Rule's use of the word "rebut" does not suggest such a "pre-motive" rule, since the Rule requires only that the statement be "offered [by a party] to rebut" the charge of improper motive, not that the district court find that the statement actually rebuts the charge. The pre-motive rule advocated by petitioner would require the district court to screen out much relevant evidence from the jury's consideration, and would thus encroach on the jury's traditional function of credibility determination.

Moreover, the word "rebut" does not mean that the prior consistent statement must be offered to refute completely the charge of improper motive. A statement can "rebut," or take away the force of, such a charge, even if it does so only partially, and in conjunction with other evidence in the case. Testimony and cross-examination about the circumstances under which the statements were made can illuminate for the jury whether, and to what extent, it should credit the statement offered in rebuttal.

Nor is the pre-motive rule compelled by the Rule's use of the word "recent," since the Rule's reference to "recent fabrication" is not properly read to refer to rebuttal of a "recent * * * improper influence or

motive," as petitioner suggests. The notion of a "recent motive" is awkward, since motives such as biases and influences typically do not arise full-blown on particular dates, but tend to be variable over time and may be eclipsed by countervailing influences. Petitioner's argument would encourage parties to manipulate the concept of a "recent motive" and would replace the truth-finding function of the jury with an effort to exclude evidence through arbitrary rules.

The standard for admissibility of evidence offered to rebut a charge of improper motive is found in Rule 401, the Federal Rules' relevancy provision. A prior consistent statement should be admitted if it is relevant to rebut the charge of improper motive, which it would be if, for example, it were made under circumstances where it was unlikely that it was the product of the improper motive. In that case, the prior consistent statement would make it more probable that the witness's in-court testimony also was not the product of an improper motive. This simple relevancy rule is more consistent with the thrust of the Federal Rules of Evidence than is petitioner's "super-relevancy" rule, which would be a marked departure from the liberal relevancy provisions of the Rules.

Although a majority of common law courts accepted the pre-motive rule before the adoption of the Federal Rules of Evidence, that historical consideration does not signify that the Rules incorporated a pre-motive rule. From the inception of the pre-motive rule, courts perceived the problems of prior consistent statements to be ones of weight and credibility. Under the Federal Rules, these are matters for the finder of fact to judge. Moreover, the Rules were adopted after a generation of academic criticism of the hearsay rule's exclusion of witnesses' prior state-

ments and a decade in which federal courts were sanctioning departures from the pre-motive rule.

II. Under the relevancy standard of Rule 401, the district court properly admitted A.T.'s prior consistent statements in this case, given the circumstances under which all of the statements were made. Even though petitioner's counsel charged that A.T. was fabricating her story on the stand out of a preference to live with her mother, her statements to three pediatricians and a social worker were unlikely to have been influenced by this motive, since A.T. likely would not have believed that they could influence the custody decision. Her initial statement to her baby-sitter was completely spontaneous, and her unwillingness to tell her mother anything about petitioner's abuse strongly suggests that she did not fabricate her story out of preference for her mother.

ARGUMENT

I. PRIOR CONSISTENT STATEMENTS OFFERED TO REBUT A CHARGE OF IMPROPER INFLUENCE OR MOTIVE MAY BE ADMITTED WITHOUT A SHOWING THAT THE STATEMENTS WERE MADE BEFORE THE INFLUENCE OR MOTIVE AROSE

A. Rule 801(d)(1)(B) Does Not Contain A Pre-Motive Rule Of Admissibility

1. Rule 801(d)(1)(B) of the Federal Rules of Evidence provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive." The Rule gives these out-of-court statements substantive effect because they "satisf[y] standards of relevancy and reliability," 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)[01], at 801-133 (1993), and are "free of the danger of abuse," C. McCormick, *McCormick on Evidence* § 251, at 603 (2d ed. 1972). When the declarant testifies in the presence of the jury and is subject to cross-examination about his or her extrajudicial statements as well as the in-court testimony, the principal danger presented by hearsay, the lack of opportunity for cross-examination, is absent. See Fed. R. Evid. Art. VIII advisory committee's note.

Nothing in the language of Rule 801(d)(1)(B) conditions the admissibility of a declarant's prior consistent statement on a showing, or a finding by the court, that the statement was made before a particular time. The unambiguous language of the Rule establishes only two prerequisites to the admission of such a statement; it must be "consistent" with the declarant's testimony, and it must be "offered to rebut" a charge that the witness is lying on the stand. If the statement satisfies these two conditions and is relevant to rebut the charge of improper motive, then it is admissible.

Because the Rule says nothing about the timing of the statement, there is no basis for reading into it a prerequisite to its application that the drafters did not provide. In enacting the Federal Rules of Evidence, Congress "made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, [the courts] must enforce the words that it enacted." *United States* v. *Salerno*, 112 S. Ct. 2503, 2507 (1992).

Petitioner contends, however, that the blanket rule he proposes can be found in the Rule's use of the word "rebut." Pet. Br. 14-27. According to petitioner, even though a consistent statement made after a motive to fabricate arises may be "relevant" to the allegation of fabrication, *id.* at 11, such a statement would not completely defeat the allegation, and therefore would not "rebut" the charge of fabrication. Petitioner argues that the Rule requires the trial court to make a finding, based on a preponderance of the evidence, that a prior consistent statement "rebuts" a charged motive to lie before admitting the statement. *Id.* at 31. Petitioner's reliance on the word "rebut" has several defects, however.

First, for the statement to be admissible, the Rule requires only that the statement be "*offered* to rebut" the charge, not that the statement, in fact, "rebut" the charge. If the district judge were required to find that the statement actually rebutted the charge of fabrication, then the Rule would have been drafted to provide that a statement is not hearsay if it is "consistent with the declarant's testimony *and rebuts* an express or implied charge against the declarant of recent fabrication or improper influence or motive." As actually written, however, the Rule gives the parties leeway to introduce evidence that tends to rebut a charge of fabrication, and it retains the jury's role in evaluating the weight and credibility of that evidence—not merely in isolation, but in light of all the evidence.[8]

[8] Of course, the court could exclude a prior statement that had nothing to do with the charged motive under Rule 402, which prohibits the introduction of irrelevant evidence. Moreover, Rule 801(d)(1)(B) requires that, to be admissible, the prior statement be "consistent with the declarant's testimony." These two safeguards suffice to prevent the introduction of irrelevant evidence.

Under petitioner's interpretation, the judge would encroach on the jury's domain of evaluating the credibility of witnesses. The purpose of Rule 801(d)(1)(B) is to permit parties to respond to their adversaries' assaults on their witnesses' credibility. In many cases, the most effective way, indeed the only way, that the offering party can rehabilitate its witness in the eyes of the jury is by introducing one or more prior consistent statements. In such cases, determining whether the prior consistent statements fully rebut the charge of improper motive is the same thing as deciding whether the testifying witness has told the truth. Petitioner's rule would take this function of credibility determination away from the jury—an extraordinary deviation from the principle that "a judge in our system does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight. * * * [The judge] may have to balance weight against prejudice in ruling on objections under Fed.R.Evid. 403, but he may not screen witnesses simply to decide whether their testimony is persuasive." *Western Indus.* v. *Newcor Canada Ltd.*, 739 F.2d 1198, 1202 (7th Cir. 1984).

The language of Rule 801(d)(1)(B) distinguishes this case from *Bourjaily* v. *United States*, 483 U.S. 171 (1987), on which petitioner relies. Pet. Br. 31. *Bourjaily* concerned Rule 801(d)(2)(E), which provides that a statement is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." In light of the

text of Rule 801(d)(2)(E), this Court concluded that, before admitting such a statement, the district courts must find by a preponderance of the evidence that, in fact, "there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" 483 U.S. at 175. But Rule 801(d)(1)(B) provides that a statement is admissible, not if it "rebuts" a charge of fabrication, but if it is consistent with the declarant's testimony and is "offered to rebut" the charge of fabrication. This significant textual difference compels the conclusion that the district court should not itself determine whether the statement conclusively "rebuts" the charge of an improper influence or motive. That is a decision ultimately to be made by the trier of fact, on the basis of all the evidence before it.

2. Petitioner's contention also ignores the fact that a statement made after a motive to lie has arisen can nevertheless rebut a charge of improper motive. Motives to fabricate do not always operate like an "off-on" switch, completely tainting statements made after they arise. A supposedly improper influence or motive can affect a witness in different ways at different times, and to a greater or lesser degree, depending on the circumstances.[9] The effect will depend on, among other things, the strength of the

[9] See, *e.g.*, *United States* v. *Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989) (suggesting that a desire to gain revenge for breaking off an affair, while "not negligible, * * * is not nearly as strong as the very powerful motive that criminal defendants may feel to give exculpatory testimony"); *United States* v. *Sampol*, 636 F.2d 621, 670-674 (D.C. Cir. 1980) (observing that witnesses can simultaneously have powerful motives to lie and to tell the truth, and these motives can fluctuate).

alleged motive to lie, the witness's force of character, and the likelihood that the declarant would be able to foresee the effect of giving the statement. The context in which the statement was made can especially illuminate whether, and to what extent, the statement persuasively rebuts the charge of fabrication.[10] All these matters bear on the weight to be given to the witness's extrajudicial statements and can be explored on cross-examination. The jury can evaluate them all as part of its assessment of the witness's credibility. But the per se rule advocated by petitioner would deprive the jury of much evidence that could assist it in evaluating whether a witness was testifying truthfully.

It may be true that, in some cases, a statement made before a motive to lie arose would *completely* rebut a charge of fabrication based on that motive. But the language of the Rule does not impose such a strict requirement, and it is not inherent in the word "rebut." Rebuttal of an argument can be a matter of degree.[11] As petitioner points out, to "rebut" has been defined as to "take away the effect of something." *Black's Law Dictionary* 1267 (6th ed. 1990). A prior statement can "take away the effect" of a charge of an improper motive, at least partially, even when it does not utterly defeat the charge. "Rebut" has also been

[10] See, *e.g.*, *United States* v. *Parry*, 649 F.2d 292, 295-296 (5th Cir. 1981) (exculpatory statement that defendant made to his mother should have been admitted, even though defendant already had a motive to fabricate).

[11] For example, after a defendant completes his case in a criminal trial, the government is entitled to offer what is usually referred to as "rebuttal" evidence. It has never been suggested, however, that the government is limited to introducing evidence that completely destroys the defense.

defined as "to contradict, meet, or oppose by formal legal argument, plea, or countervailing proof," "to expose the falsity of," and "to make or put in an answer or counter proof." *Webster's Third New International Dictionary* 1893 (1986). None of these definitions suggests that a single statement must completely overthrow the effect of an argument in order to rebut it. As this Court knows from its own practice, rebuttal argument can be entirely proper even when it is less than devastating and ultimately unpersuasive. There is no reason to believe that Rule 801(d)(1)(B) incorporates a standard more exacting than the common understanding of the meaning of "offered to rebut."

Petitioner's rule, by contrast, would require the court to decide whether each statement, by itself, would completely defeat the charge of improper motive, instead of considering whether the statement, in conjunction with the other evidence in the case, would lead the jury to a full evaluation of the witness's credibility. This contention that a single piece of evidence must, by itself, completely rebut an argument reflects an unrealistic view of the nature of evidence. As Professor Charles McCormick wrote, "A brick is not a wall," see Fed. R. Evid. 401 advisory committee's note; one piece of evidence cannot be expected to do all of a party's work. Even if no single one of several prior consistent statements, considered in isolation, would completely refute a contention that a witness was lying on the stand, the fuller picture of the witness's prior story, given by the pattern of her statements over time, may convince a jury that the witness's in-court testimony is truthful and that the impeachment is misdirected.

This case well exemplifies why petitioner's construction of "rebut" to mean "completely rebut" should be rejected. Even if any one of A.T.'s out-of-court statements, by itself, would not have conclusively demonstrated that her in-court testimony was absolutely free of an improper motive, the consistent pattern of her statements and the circumstances surrounding them may have persuaded the jury that she was not fabricating her in-court testimony out of malice against petitioner. For example, A.T. made three of her statements to pediatricians during the course of medical examinations and made a fourth to a caseworker interviewing her about the abuse. Even if A.T. disliked petitioner intensely, it is doubtful that this dislike would have caused her to repeat a fabrication during the course of a doctor's examination or an interview by a caseworker investigating the abuse. There is no reason to believe that A.T. thought that either the pediatrician or the caseworker could influence the custody decision. Her motive to lie to them was therefore very weak, even though the motive may have been in existence at the time.

3. Petitioner suggests that the pre-motive rule may also be found in the Rule's use of the word "recent," in referring to a "charge against the declarant of recent fabrication or improper influence or motive." Petitioner urges that "recent" modifies "improper influence or motive" as well as "fabrication." Pet. Br. 17-19. Petitioner would thus read the Rule to refer to rebuttal of a "recent * * * improper influence or motive," and would interpret the Rule to require that the prior consistent statement be anterior in time to the "recent motive" to be admissible.

This is a strained reading of the Rule, and the very concept of a "recent motive" is a peculiar one. Motives do not always develop, in full flower, at a specific moment. Nor is it always possible to fix a time when one can say, with complete certainty, that a witness is not affected by a motive. This is particularly true when the charge of an "improper motive" is (as here) that the witness is biased against a party. Even if A.T. might have fabricated her story because she disliked her father and preferred to live with her mother, it could be impossible to determine that her preference for her mother arose on a particular date, or that she was free of that motive before such a date.

The varying and complex nature of biases, preferences, and similar influences suggests that petitioner's argument based on "recent" is incorrect. Such motives do not necessarily operate at all times, or to the same degree, and they may be eclipsed, in part or in whole, by countervailing influences. Thus, even if a witness, such as A.T., were inclined to color her statements against someone because of a strong dislike of that person, that witness might find herself in a situation, such as a medical examination, where the bias diminished in importance but did not disappear entirely. Requiring a judge to determine that a witness's bias in favor of or against someone emerged on a particular date would be a highly artificial exercise, neither necessary nor useful to the fact-finding function of the trial. Instead, the extent to which any number of motives may have influenced a witness's statement can and should be explored on cross-examination and evaluated by the jury.

Thus, "[b]ecause of the many facets of human motivation," *Castaneda* v. *Partida*, 430 U.S. 482, 499

(1977), petitioner's proposed rule would be hard to apply, even though it purports to have the virtue of simplicity. See 4 D. Louisell & C. Mueller, *Federal Evidence* § 420, at 193-194 (1980). It is often difficult to determine when a motive or influence first appears, or whether the motive at the time the prior statement was made is the same motive that drives the witness's testimony at trial. That very problem is presented by the alleged improper motive at issue in this case. When a child dislikes her father and prefers to live with her mother, it may be impossible to say with any degree of confidence when that motive first arose, and dislike of one parent might influence statements made by a child even prior to the parents' separation.

Because of these ambiguities, a party could manipulate the pre-motive rule effectively to prevent its adversary from introducing highly relevant rebuttal evidence. In civil litigation, any prior consistent statement made before the commencement of the lawsuit but after the incident out of which the suit arose might be vulnerable under that rule. In criminal cases, defendants frequently charge that accomplices testifying for the government are motivated to lie because of promises of leniency, and the government often tries to rebut that charge by showing that the accomplice made the same statement to the police when he was first under investigation. A defendant could plausibly try to bar that evidence, relying on petitioner's per se rule, claiming that the accomplice was aware, even at a very early stage in the investigation, that the government might offer him a deal.[12] Petitioner's per se approach would

---

[12] Cf. *United States* v. *Henderson*, 717 F.2d 135, 138-139 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *People* v. *Duvall*,

thus convert the adversary procedures and truth-seeking function of the trial into an attempt to win by excluding relevant evidence through artificial rules.

The more natural reading of the Rule is that "recent fabrication" and "improper influence or motive" refer to separate types of impeachment. This reading comports with the fact that, under the common law, courts and commentators frequently (although not invariably) distinguished between charges of "recent fabrication" and "improper influence or motive."[13] While the allegations may in some circumstances overlap, the basic difference is that a charge of recent fabrication usually implies "negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now." 4 J. Wigmore, *Evidence* § 1129, at 271 (Chadbourn rev. ed. 1972). To put it another

---

68 Cal. Rptr. 708, 710 (Cal. Ct. App. 1968); *State* v. *Kane*, 75 A.2d 894, 898 (N.J. Super. Ct. App. Div. 1950) (Brennan, J.) (admitting accomplice's prior statement, given after his arrest).

[13] See 4 J. Wigmore, *Evidence* § 1129, at 270 (Chadbourn rev. ed. 1972) ("Impeachment on the ground of recent contrivance must be distinguished (as it is not always) from the foregoing ground [of impeachment by bias, interest, or corruption]"); 3 J. Weinstein & M. Berger, *supra*, ¶ 607[08], at 607-115 (discussing the "two situations" as exceptions to general rule of inadmissibility); M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 75 A.L.R.2d 909, 937, 939 (1961) (discussing separately "[m]otive to falsify; bias or interest" and "[c]harge of recent fabrication"); M.C. Dransfield, Annotation, *Admissibility, for purpose of supporting impeached witness, of prior statements by him consistent with his testimony*, 140 A.L.R. 21, 80, 93 (1942) (same).

way, a charge of recent fabrication involves an allegation that "the witness has made it all up," 4 D. Louisell & C. Mueller, *supra*, § 420, at 188, to meet the exigencies of the case.[14] In response to a charge of recent fabrication, the purpose of the prior consistent statement is to show that, at an earlier time, "the witness did speak and tell the same story." 4 J. Wigmore, *supra*, § 1129, at 271.

For the reasons we have explained, however, temporal considerations in themselves are often less telling in rebutting a charge of "improper influence or motive." Here, for example, petitioner has not suggested that A.T. first fabricated her story for the purpose of the criminal trial. Hence, the pattern of A.T.'s prior consistent statements, and the circumstances in which they were made, were highly relevant to the basic truth-seeking purpose of the trial.

---

[14] See *Lyke* v. *Lehigh Valley R.R.*, 84 A. 595, 599 (Pa. 1912) (charge of "recent fabrication" is a charge that the plaintiff's testimony was "concocted for the purpose of the trial"); *People* v. *Walsh*, 301 P.2d 247, 251 (Cal. 1956); *People* v. *Gentry*, 76 Cal. Rptr. 336, 343-344 (Cal. Ct. App. 1969); *State* v. *Wolf*, 245 P.2d 1009, 1012 (Wash. 1952) (en banc); *Houston & T.C. Ry.* v. *Fox*, 166 S.W. 693, 695 (Tex. 1914); *Lanasa* v. *State*, 71 A. 1058, 1065 (Md. 1909); *Commonwealth* v. *Jenkins*, 76 Mass. 485, 489-490 (1858) (discussing situation where witness is alleged to have "formerly withheld or concealed the facts to which he has now testified," and identifying *Commonwealth* v. *Wilson*, 67 Mass. 337 (1854), as such a case; in *Wilson*, witness was asked on cross-examination when he was first asked about his story, and he answered, "about six weeks before," *id.* at 340). See also *Garcia* v. *Watkins*, 604 F.2d 1297 (10th Cir. 1979) ("recent fabrication" case under Federal Rules); *Tompkins* v. *Erie R.R.*, 90 F.2d 603, 605-606 (2d Cir. 1937), rev'd on other grounds, 304 U.S. 64 (1938).

B. A Pre-Motive Rule Would Be Contrary To The Overall Thrust Of The Federal Rules Of Evidence And Is Not Necessary To Prevent Abuses Suggested By Petitioner

1. Petitioner argues, in essence, that Rule 801(d)(1)(B) contains a "super-relevancy" rule categorically excluding all statements of a witness made after a motive to lie arose. That rule should apply, petitioner contends, even if those statements are relevant, within the meaning of Rule 401,[15] to rebut the charge of improper influence or motive, because those statements, by themselves, would not be conclusive on the issue of improper motive. This interpretation of Rule 801(d)(1)(B) is at odds with the basic philosophy underlying the Federal Rules of Evidence, and particularly the relevancy provisions. As this Court recently observed in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), in which it rejected an evidentiary standard requiring a heightened showing of probativeness as incompatible with the Federal Rules of Evidence, the Rules have a "liberal thrust" favoring the admission of relevant evidence, *id.* at 2794, and the consideration of all relevant evidence by the trier of fact.

Under Rule 401, relevant evidence is all evidence having "*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) "The Rule's basic standard of relevance thus is a liberal

---

[15] Federal Rule of Evidence 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

one," *Daubert*, 113 S. Ct. at 2794, and Rule 401 rejects the view that any piece of evidence, by itself, must conclusively demonstrate the existence of any fact in the action. All that is required is that "the item of evidence *tend to prove* the matter sought to be proved[.]" Fed. R. Evid. 401 advisory committee's note (emphasis added). "Given the Rules' permissive backdrop," *Daubert*, 113 S. Ct. at 2794, it would be strange if the drafters intended to incorporate petitioner's "austere standard," *ibid.*, rather than the liberal one of relevancy that is dependent on the facts and circumstances of individual cases.

Under the standard of Rule 401, a prior consistent statement made after an alleged motive to lie arose would be relevant as long as it tended to prove that the witness's in-court testimony was not the product of an improper motive. An extrajudicial statement could tend to prove this by demonstrating that the witness had told a similar story at another time and under circumstances in which the jury could conclude that the charged motive was unlikely or less likely to have influenced his or her statement. Thus, in this case, A.T.'s extrajudicial statements were relevant because the circumstances under which they were uttered made it highly unlikely that the statements were the product of the alleged improper motive. Her statements to her baby-sitter were spontaneous; she was reluctant to give her baby-sitter details of the abuse or to tell her mother about the abuse at all; and her statements to her caseworker and pediatricians were made under circumstances where she would be unlikely to have thought that her statements would influence her custody. The entire pattern of her consistent story outside court also tended to prove that she told the truth on the stand.

While the standard of admissibility under Rule 401 is liberal, it is not devoid of content. The district court retains the authority to exclude statements where there is no reason to believe that the witness's motives in making them differed from those influencing the witness at trial. Rule 401 would thus prevent parties from introducing out-of-court statements uttered shortly before trial solely for the purpose of corroborating their in-court testimony. Such statements would not make it more probable that the in-court testimony was free of an improper motive. For example, Rule 401 could have prevented the government from introducing statements that A.T. made to the prosecuting attorneys during preparation for trial. Such statements would have done little, if anything, to rebut the charge that A.T. was testifying falsely because of a preference to live with her mother.

Petitioner's argument is also inconsistent with the structure of the Federal Rules, which deal separately with problems of relevancy, in Article IV, and problems of reliability of hearsay, in Article VIII. The theory underlying the rule against hearsay is not that hearsay statements, *if believed*, would not tend to prove a matter in the case (a relevancy problem), but rather that the out-of-court and uncross-examined nature of the statements prevents the jury from accurately determining whether the declarant *should be believed* (a reliability problem). "The main justification for treating [hearsay] differently from other testimonial proof must be that the trier can more readily come to a correct conclusion with respect to credibility if he observes the declarant making his statement, * * * being observed by an adverse party, and subject to almost

immediate searching cross-examination to test the various elements of his credibility." Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 333 (1961). If evidence does not present any hearsay danger that would prevent the trier of fact from making an accurate determination of the declarant's credibility, as is the case with prior consistent statements made by a witness who is subject to cross-examination about the statements, there is no reason in the hearsay rules themselves to exclude the evidence. The problems that petitioner perceives in "post-motive" prior consistent statements, namely problems of the weight and credibility of the statements, are not the kind of difficulties to which the Rules' hearsay provisions are directed.

2. Petitioner contends, however, that a per se rule is necessary to prevent abuses. Petitioner suggests, for example, that without his rule, the government will be able to make its case by repeating the same out-of-court accusations over and over again, through a "parade of witnesses." Pet. Br. 33. But petitioner's rule is not necessary to prevent this abuse, for Rule 401 permits the introduction of evidence only if it makes the fact to be proved more probable than it would be without the evidence. A witness who simply repeated an out-of-court statement about a fact that had already been related, in exactly the same way, by another witness would not be giving testimony that made the fact more probable than it was without that testimony. Similarly, if "an FBI agent * * * question[ed] a witness a few minutes before he takes the stand in order to elicit a prior consistent statement for just the purpose of bolstering the trial testimony," *United States* v. *Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992), that statement would add

nothing to the witness's in-court testimony, and would be excluded as irrelevant. Rule 403 also gives the district courts authority to exclude evidence upon "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Second, petitioner argues that a per se rule is needed to prevent "parties in both civil and criminal cases [from] manufactur[ing] statements in order to buttress the declarant's story at trial." Pet. Br. 33. This danger, however, is precisely the sort of abuse that cross-examination is well designed to expose. Since Rule 801(d)(1)(B) permits the introduction of prior consistent statements only when the declarant is subject to cross-examination, the cross-examining attorney can closely question both the declarant and the witness relating the statement about all the circumstances under which the statement was made. By doing so, the attorney can demonstrate to the jury that the statement may have been concocted for the purposes of trial—just as an attorney can demonstrate, through cross-examination, that a witness's testimony on the stand may be a "recent fabrication" contrived for the purposes of trial. Even if, as petitioner speculates (Pet. Br. 34), parties tried to route out-of-court statements through particularly credible witnesses, such as "elder statesmen and spiritual leaders," who would give the statements a veneer of credibility that they would not otherwise deserve, the attorney for the opposing party would still have available all the tools of cross-examination. Cross-examination could demonstrate that the witness barely knew the declarant or had little independent understanding of the significance of the out-of-

court statement, thus suggesting to the jury that the testimony was entitled to little weight.[16]

C. The Antecedents Of Rule 801(d)(1)(B) Do Not Warrant The Conclusion That It Incorporates A Pre-Motive Rule

Petitioner argues that Rule 801(d)(1)(B) must be read to include an absolute pre-motive rule of admissibility because, in his view, the Rule incorporated the common law rule on this issue. Pet. Br. 19-25. While petitioner is correct that the majority of common law courts adopted the pre-motive principle, that consideration does not justify a conclusion that Congress incorporated a pre-motive rule into Rule 801(d)(1)(B). The common law rule was never so absolute as petitioner suggests, and many courts viewed the question of prior consistent statements as one of relevancy, which today would be addressed under Rule 401. In addition, the Federal Rules of Evidence were adopted after a generation of strong criticism of the common law rule, and after a decade in which the federal courts were beginning to depart from it.

1. Until the end of the seventeenth century, prior consistent statements were freely admissible during a party's case in chief as substantive evidence. Even

---

[16] In extreme cases, the district courts could exclude such evidence under Rule 403 because of the danger of unfair prejudice or misleading the jury. Cf. *City of New York* v. *Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (affirming exclusion under Rule 403 of government report based on hearsay because of its unwarranted "aura of special reliability and trustworthiness"), cert. denied, 454 U.S. 1164 (1982); *United States* v. *Carswell*, 922 F.2d 876, 879 (D.C. Cir. 1991) (affirming exclusion under Rule 403 of proffered testimony by expert who had only "threshold level of expertise").

after the development of the rule against hearsay, prior consistent statements continued to be admissible during a party's case in chief to corroborate a witness's testimony. See *Lutterell* v. *Reynell*, 1 Mod. Rep. 282, 283 (1670); Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437, 446-447 (1904).

In this country, judicial hostility against the admission of prior consistent statements developed in the middle of the nineteenth century. Three cases are often cited as establishing the rule that prior consistent statements must predate an alleged motive to lie to be admissible: *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412 (1836); *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480 (1850); and *Stewart* v. *People*, 23 Mich. 63 (1871) (Cooley, J.). Petitioner relies heavily on *Ellicott* and *Conrad*, but neither case adopted his pre-motive rule. Moreover, both *Conrad* and *Stewart* clearly treated the issue of the timing of a statement as a problem of weight and credibility, and under the Federal Rules of Evidence these matters are for the jury to evaluate.

In *Ellicott* v. *Pearl*, the plaintiffs attempted to show that the defendants were wrongfully occupying land to which the plaintiffs claimed title under a land patent. The defendants claimed a right to the land under an earlier patent (Remey patent). At issue was the validity of a survey of the Remey patent lands. To establish that the survey was erroneous, and therefore that the Remey patent did not cover their land, the plaintiffs introduced the deposition of one of the surveyors, who explained that, in his survey, he confused two creeks crossing the area. 35 U.S. (10 Pet.) at 419-421 (statement of case). To impeach this testimony, the tenants introduced evidence of prior inconsistent statements by the surveyor, to the effect that the survey was correct. *Id.* at 439. The

plaintiffs, in rebuttal, attempted to introduce prior consistent statements by the surveyor. The trial court excluded the prior consistent statements.

This Court affirmed the exclusion of the evidence, stating that the unsworn prior consistent statements were not admissible to corroborate the surveyor's sworn deposition because "[h]is testimony under oath is better evidence than his confirmatory declarations, not under oath; and the repetition of his assertion does not carry his credibility further, if so far, as his oath." 34 U.S. (10 Pet.) at 439. The Court also stated, in dicta, that there were exceptions to the rule against the admission of prior consistent statements to corroborate a witness's testimony, "as, where the testimony is assailed as a fabrication of recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." *Ibid.*

Ellicott is not a helpful guidepost for this case. First, the surveyor did not testify at trial; his impeached deposition testimony was itself hearsay. *Ellicott* is thus quite unlike cases arising under Rule 801(d)(1)(B), including this one, where the out-of-court declarant testifies and is subject to cross-examination, and it is of little relevance in deciding issues that arise under the hearsay rule in the Federal Rules of Evidence, which is principally grounded in concerns about the opportunity for cross-examination of the declarant. See Fed. R. Evid. 801 advisory committee's note. Second, the court's dictum discussing other situations in which prior consistent statements might be received as evidence did not purport to set forth all the contexts in which such statements would be admissible. Third, *Ellicott*

did not even address the precise issue presented in this case.[17]

In *Conrad* v. *Griffey*, the manufacturer of a sugar mill brought suit against a planter who had ordered the mill's construction. The planter defended on the ground that the mill was defectively made and installed. The plaintiff introduced into evidence interrogatories by the engineer who had supervised the construction, in which he testified that the materials and labor were workmanlike. The defendant impeached the engineer by introducing statements he had made to others, shortly after an accident at the mill, to the effect that the mill was defectively built. To corroborate the engineer's interrogatory answers, the manufacturer introduced an affidavit and an unsworn statement by the engineer, declaring that the mill was properly constructed.

Although observing that "[t]he practice on this subject * * * differ[s] much in different States," 52 U.S. (11 How.) at 490, and that, in several States, prior consistent statements were admitted "without reference to their priority" in time to prior inconsistent statements, *id.* at 490-491, this Court reversed and held that the affidavit and unsworn out-of-court statement should have been excluded. The Court reasoned that out-of-court consistent statements made after inconsistent statements may well be made

[17] *Ellicott* did not concern introduction of prior consistent statements after a charge against a witness of improper motive, as in this case, but rather prior consistent statements in the different context of impeachment of a witness through his prior inconsistent statements. The rule of *Ellicott*, that the consistent statement must predate the inconsistent statement to be admissible, never became the general rule in this country. See 4 J. Wigmore, *supra*, § 1127, at 267.

"for the very purpose of counteracting those first uttered," which "impairs their force and credibility." *Id.* at 491-492.[18]

The Court thus based its ruling on doubts about the credibility and weight of prior consistent statements, in the particular context of statements contradicting a prior inconsistent statement. However, *Conrad*'s indication that some prior consistent statements should be excluded because of concerns about their credibility and weight has been superseded by the more liberal relevancy standard of Rule 401. See pp. 28-30, *supra*. Indeed, both *Conrad* and *Ellicott* would be decided differently under the Federal Rules of Evidence.[19]

[18] As in *Ellicott*, the declarant in *Conrad* was not subject to cross-examination. Also, as in *Ellicott*, the Court was not presented with a consistent statement made to rebut a charge of improper motive, but rather a consistent statement offered in response to a prior inconsistent statement. The "pre-motive" issue presented in this case could not have been dispositive in *Conrad*, because one of the prior consistent statements made by the engineer, the affidavit, was executed before the motive arose, when the manufacturer filed his lawsuit. The affidavit was executed on April 3, 1846 (52 U.S. (11 How.) at 484-485 (statement of case)), and the lawsuit was filed on December 23, 1846 (*id.* at 481 (statement of case)). The accident at the mill took place in November, 1845 (*id.* at 481-482 (statement of case)), and the engineer's prior inconsistent statements were made "just after the * * * accident" (*id.* at 482 (statement of case)).

[19] In both cases, the prior consistent statements would be admissible under Rule 806. Under that Rule, the credibility of a hearsay declarant may be attacked, and, if attacked, supported, "by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." As explained in note 24, *infra*, even those circuits that have adopted petitioner's pre-motive rule permit the introduction of

The view that prior consistent statements present problems of weight and credibility is also reflected in *Stewart* v. *People*, in which the Michigan Supreme Court, per Justice Cooley, addressed basically the same issue as that presented in *Ellicott* and *Conrad* but came to a different result. The court affirmed the admissibility of testimony about the contents of a letter, written by the State's principal witness against the defendant, in which the writer, by implication, identified the defendant as a participant in a scheme to steal silverware. 23 Mich. at 64, 66-67 (statement of case). The contents of the letter were offered to rebut a prior inconsistent statement by the writer, denying that the defendant was involved in the scheme. *Id.* at 64 (statement of case).

After observing that the credibility of a witness was fundamentally an issue for the jury to decide, 23 Mich. at 75, the court concluded that "[t]he proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to affect belief in the mind of a reasonably cautious person," *ibid.*—a test close to, though perhaps not identical with, the test incorporated in the relevancy rules of the Federal Rules of Evidence. The court observed that, in many circumstances, the fact that a witness "has always previously given a consistent account of the transaction in question" might be relevant to the jury's consideration. *Id.* at 75-76. Also, "[t]he tender age of the principal witness might sometimes be an important consideration." *Id.* at 76. The court concluded that "[i]t is impossible to lay down any arbitrary rule which could be properly applied to every case in which

---

statements made after the motive to lie arose for the limited purpose of rehabilitating the witness's credibility.

this question could arise," and that the trial court's discretion in this matter "ought not to be set aside except in a clear case of abuse." *Ibid.* This reasoning, we submit, is more consistent with the policies underlying the Federal Rules of Evidence than is petitioner's suggested rule.

From the very beginning, therefore, courts considered the problem of prior consistent statements to be one of weight and credibility. Nevertheless, petitioner is correct that the majority rule, as developed in the latter half of the nineteenth century, was that prior consistent statements offered to rebut a charge of improper motive were admissible only if the statements were made before the motive arose. This was not the universal rule, however. Some decisions characterized the rule of admissibility as a more broad and flexible one, under which prior consistent statements could be admitted if they were made under circumstances where it was unlikely that an improper motive would have influenced the statement.[20]

---

[20] See, *e.g.*, *Waller* v. *People*, 70 N.E. 681, 682 (Ill. 1904) ("[P]roof that [the witness] gave a similar account of the transaction when the motive did not exist, *or before the effect of the account could be foreseen*, is admissible.") (emphasis added); *In re McClellan's Estate*, 111 N.W. 540, 543 (S.D. 1907) (similar); *Sweazey* v. *Valley Transport, Inc.*, 107 P.2d 567, 572 (Wash. 1940) (similar, and describing the problem as one of relevancy); *State* v. *George*, 30 N.C. 324, 328 (1848) (rejecting pre-motive rule, holding prior consistent statements admissible after a witness's credibility is attacked, and observing that pre-motive rule "applies more properly to the *weight* than to the *competency* of the testimony"); see also *Brookbank* v. *State ex rel. Murphy*, 55 Ind. 169, 172 (1876) (prior consistent statements admissible even if made after prior inconsistent statements); *Henderson* v. *Jones*, 10 Serg. & Rawle 322 (Pa. 1823)

2. Beginning in the 1940's, the exclusion of prior statements of a witness came under strong criticism from academic commentators. Their point was that prior statements of a witness who testified at trial and was subject to cross-examination did not present a hearsay problem. The fundamental insight supporting this conclusion was that the true justification for the exclusion of hearsay was "the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported by the witness." C. McCormick, *Law of Evidence* § 224, at 458 (1954); see also Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1, 4 (1937); Wheaton, *What Is Hearsay?*, 46 Iowa L. Rev. 210, 220-221 (1961). When, in cases such as the present one, the declarant testified and could be cross-examined about her out-of-court statements as well as her in-court testimony, the policies behind the rule against hearsay presented no reason to exclude the extrajudicial statements. See 3 J. Wigmore, *Evidence* § 1018, at 688 (3d ed. 1940); J. Maguire, *Evidence: Common Sense and Common Law* 62 (1947); Morgan, *The Hearsay Rule*, *supra*, 12 Wash. L. Rev. at 8; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 192 (1948); Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. Rev. 43, 52-53 (1954); Weinstein, *Probative Force of Hearsay*, *supra*, 46 Iowa L. Rev. at 333 (calling characterization of extrajudicial statements of testifying witnesses as hearsay a "practical absurdity").[21] In short, hearsay

(admitting prior consistent statement after evidence admitted to impeach witness's character, without discussion of timing).

[21] These criticisms were reflected in the American Law Institute's (ALI) Model Code of Evidence Rule 503(b) (1942), which provided that "[e]vidence of a hearsay declaration is admissible if the judge finds that the declarant * * * is present and subject to cross-examination." In proposing this liberalization of the hearsay rule, the ALI observed that "the declarant is always present and subject to cross-examination," and that "the adversary is fully protected and the jury is in a favorable position to place a fair value upon the declaration in combination with [the] declarant's present testimony." American Law Institute, Model Code of Evidence Rule 503 comment b, at 234 (1942). The ALI also suggested (*ibid.*) that, if the increment of probative value added by the extrajudicial statement would be slight, it could be excluded under a separate, relevancy rule (ALI Model Rule 303), similar to the current Rule 403 of the Federal Rules of Evidence. Similarly, Rule 63(1) of the Uniform Rules of Evidence, which was adopted by the National Conference of Commissioners on Uniform State Laws in 1953, provided for the admissibility as substantive evidence of "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness."

was recognized to present problems of reliability, rather than relevance and probative value.

These criticisms had effect in the decade preceding the adoption of the Federal Rules of Evidence. Even when district courts did not strictly follow the rules governing prior consistent statements, appellate courts were reluctant to reverse, and they increasingly regarded the admission of prior consistent statements to be within the broad discretion of the district courts. Several courts eschewed a mechanical application of the pre-motive rule "in favor of a more flexible rule which would admit evidence of prior consistent statements when, under the circumstances of the case, they would have probative value and would, therefore, aid the jury in judging

credibility." 3 J. Weinstein & M. Berger, *supra*, ¶ 607[08], at 607-116.

For example, in *United States* v. *Bays*, 448 F.2d 977 (5th Cir. 1971), cert. denied, 405 U.S. 957 (1972), the court affirmed the district court's decision to admit prior consistent statements, made by a government witness following his arrest, to rebut a defense charge that the witness was motivated to lie by hopes of a light sentence. In rejecting the argument that the witness's statement was inadmissible because it was made after the motivating event (the witness's arrest), the court emphasized that the jury saw and heard all the witnesses, including the declarant, and that the prior consistent statement had probative value that could assist the jury. *Id.* at 979.

Similarly, in *Hanger* v. *United States*, 398 F.2d 91 (8th Cir. 1968), cert. denied, 393 U.S. 1119 (1969), the court of appeals upheld, as within the discretion of the trial court, the admission of prior consistent statements over an objection that the statements were "made *after* the inconsistent statements were made and the motive of [the witness] to fabricate was greatest—to shift responsibility for the crime to others after reflection." *Id.* at 104.. The court explained that, when such a charge of fabrication is made, "all of the incidents and factors that shed light upon his credibility, both pro and con, are admitted, subject to the Court's discretion, and left to the jury for its evaluation and determination. * * * [O]nly by a full exposure of the relevant and pertinent facts in this difficult situation can the jury make an

intelligent and reasonable attempt to ascertain the truth." *Id.* at 105.[22]

Thus, by the time Congress adopted the Federal Rules of Evidence in 1974, the law with respect to the admissibility of prior consistent statements was undergoing considerable liberalization, and the strict common law rule excluding statements made after an alleged motive to lie arose was being replaced by a "flexible approach in determining the admissibility of prior consistent statements for rehabilitation." 3 J. Weinstein & M. Berger, *supra*, ¶ 607[08], at 607-118. This flexible approach was "consistent with the [subsequent] recognition by the Federal Rules of Evidence that relevancy turns on the particular circumstances of each case," *id.* at 607-120, but it is inconsistent with petitioner's blanket rule that would exclude much potentially relevant evidence.

3. The legislative history of the Federal Rules of Evidence and the advisory committee's notes shed little light on the specific question presented in this case. It is clear, however, that, as a general matter, Rule 801 repudiated the common law's hostility to prior statements of a witness. The logic behind Rule 801(d)(1) is that prior statements of a witness present little hearsay danger because the witness may be questioned about them on cross-examination. Rule 801(d)(1) thus departed from the "orthodox position" that all prior statements of a witness were hearsay.

---

[22] See also *United States* v. *Gandy*, 469 F.2d 1134 (5th Cir. 1972); *United States* v. *Zito*, 467 F.2d 1401, 1403-1404 (2d Cir. 1972); *Copes* v. *United States*, 345 F.2d 723, 726 & n.8 (D.C. Cir. 1964).

See 4 J. Weinstein & M. Berger, *supra*, ¶801(d)(1)[01], at 801-128.[23]

Rule 801(d)(1)(B) also discarded an archaic provision of the common law, which required trial courts to instruct jurors that prior consistent statements could not be used as substantive evidence but could only be considered for the purpose of rehabilitation of a witness's character after cross-examination. See Fed. R. Evid. 801(d)(1)(B) advisory committee's note. While this particular broadening of the use of prior

[23] Rule 801(d)(1)(B) does not admit all prior consistent statements of a witness, but only those offered to rebut a charge of recent fabrication or improper influence or motive. The Federal Rules therefore do not go so far as the ALI Model Code of Evidence or the Uniform Rules of Evidence proposed, nor so far as many academic commentators would have gone. While the legislative history and the advisory committee's notes do not explain why the drafters of the Rule were unwilling to adopt a broader rule, the limitation appears to rest on the idea that the rule against hearsay is a version of the "Best Evidence" rule. When the witness testifies to a matter and is not impeached, there is no need to introduce any prior statement reciting the same statement; the better evidence is the live testimony, and the prior statement is purely cumulative. When the witness is impeached, however, his testimony can be corroborated through the introduction of a prior consistent statement.

It is also true that Rule 801(d)(1)(A) limits the admissibility of prior *inconsistent* statements to those given under oath. This limitation, however, was not part of the Rule as drafted by the advisory committee or transmitted by this Court, but was added by Congress, and the advisory committee strongly opposed the amendment. Congress added this restriction because of concerns that a criminal defendant could be convicted solely on the basis of an unsworn out-of-court statement. See generally 4 J. Weinstein & M. Berger, *supra*, at 801-13 to 801-36.

consistent statements does not bear directly on the issue in this case, it does further rebut petitioner's contention that the drafters of Rule 801 adhered to traditional common law conceptions of hearsay evidence in this context.[24]

In sum, given the substantial criticism of the common law rule in the generation before the adoption of the Federal Rules of Evidence, the weakening of that rule in the courts, and the Rules' repudiation of the common law's hostile stance against prior consistent statements, there is no persuasive reason to conclude that Rule 801(d)(1)(B) incorporated, by implication, the common law pre-motive rule.

[24] This case does not require the Court to decide whether a pre-motive rule also applies to prior consistent statements that are not admitted as substantive evidence, but are used merely to rehabilitate a witness after impeachment through a prior inconsistent statement. Every circuit that has adopted petitioner's pre-motive rule has held that it does not apply when the statement is not admitted as substantive evidence. See *United States* v. *Brennan*, 798 F.2d 581, 587-589 (2d Cir. 1986); *United States* v. *Bowman*, 798 F.2d 333, 338 (8th Cir. 1986); *United States* v. *Harris*, 761 F.2d 394, 400 (7th Cir. 1985); *United States* v. *Parodi*, 703 F.2d 768, 784-785 (4th Cir. 1983). See also *United States* v. *Rubin*, 609 F.2d 51, 66-70 (2d Cir. 1979) (Friendly, J., concurring), aff'd, 449 U.S. 424 (1981). The reasoning is that impeachment of witnesses is not addressed in Article VIII of the Federal Rules of Evidence but in Article VI, and, in particular, that impeachment of witnesses by prior inconsistent statements is not limited by Rule 801(d)(1)(A). See *United States* v. *Marchand*, 564 F.2d 983, 999 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Porter*, 544 F.2d 936, 938 n.2 (8th Cir. 1976). Since Rule 801(d)(1) places no limits on impeachment of witnesses by their prior statements, it arguably places no limits on their rehabilitation by the same method.

II. THE DISTRICT COURT PROPERLY ADMITTED A.T.'S PRIOR CONSISTENT STATEMENTS

The district court properly admitted A.T.'s prior consistent statements because the circumstances in which the out-of-court statements were made suggested that they were not the product of the alleged discrediting motive. The out-of-court statements therefore tended to show that A.T.'s testimony on the stand was also not the product of an improper influence or motive.

As the court of appeals observed (J.A. 36), the alleged motive to fabricate in this case was unlikely to have influenced A.T.'s out-of-court statements. It is doubtful that a five-year-old child would have had the sophistication necessary to formulate and implement a deceptive scheme necessary to ensure her return to her mother's custody. As the court of appeals correctly noted, there was no evidence "that the five-year old A.T. possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme." *Ibid.* A five-year-old child who wished to remain with her mother because she had more friends where her mother lived and because she missed her mother when she was with her father would likely have said so, instead of concocting an elaborate tale about sexual abuse. By far the most likely motivation for A.T.'s statements about sexual abuse, therefore, is that they were true.

Even if some credence is lent to the possibility that A.T. might have invented her story on the witness stand because she wanted to stay with her mother, the circumstances in which A.T. made her out-of-court statements strongly suggest that they were

not fabrications of that kind. Kae Ecklebarger (the Child Protection Services caseworker) and the three pediatricians were all strangers to A.T., and there was no reason for A.T. to believe that they had any influence on the issue of custody. Although A.T. knew she was there "because of what [petitioner] had done to her," V Tr. 317, A.T.'s statement to Ecklebarger was made in the context of an investigation into the abuse, not the custody determination.

In addition, Ecklebarger's interview of A.T. took place outside the presence of her mother, and Ecklebarger was careful not to ask A.T. any leading questions. V Tr. 315-316. A.T.'s detailed statement to Ecklebarger and her demonstration of the abuse on the caseworker's anatomically correct dolls also indicate that A.T.'s statement to Ecklebarger was not merely a repetition of what she had told her baby-sitter. Dr. Kuper watched for coaching from A.T.'s mother when she asked A.T. questions, and she did not bring up the subject of A.T.'s fear of returning to her father, V Tr. 281-283, which might have influenced A.T.'s statement to her. Dr. Reich was not even aware that A.T. was involved in a custody dispute. V Tr. 302. Because the circumstances under which all of these statements were made indicate that they were not colored by A.T.'s wish to stay with her mother, they were clearly admissible to rebut a charge of improper motive.

Likewise, the district court did not abuse its discretion in admitting into evidence A.T.'s statements to Rocha, her baby-sitter. The circumstances under which they were made also tended to show that A.T. was not fabricating the statements out of a wish to stay with her mother. A.T.'s first allegation to Rocha was spontaneous. A.T. refused at first to give Rocha

any explanation of this statement, which is behavior inconsistent with the suggestion that A.T. was deliberately making up the statement to prevent her return to her father. A.T. also straightforwardly told Rocha that she did not want to go back to her father, which is inconsistent with the charge that A.T. was concocting an elaborate story because of an underlying, concealed motive to stay with her mother. The rest of A.T.'s statements to Rocha were detailed and unprompted by leading questions, indicating they were free of any improper influence or suggestion on the part of her mother or Rocha.

A.T.'s refusal to tell her mother about the abuse is an especially persuasive factor indicating that her statements to Rocha were not fabricated. If A.T. in fact had made up her allegations of abuse because she wanted to stay with her mother, she most likely would have gone directly to her mother with the story. But, according to both her mother and Rocha, A.T. would not tell her mother what she meant by her spontaneous comment to Rocha, and A.T. started crying when her mother pressed her for an explanation. J.A. 19; V Tr. 199, 222; VI-A Tr. 406-407. Rocha had to go over to A.T.'s mother's house to get the rest of the story from A.T, and A.T. still would not explain her story until her mother left the room. VI-A Tr. 407. Only when her mother was out of the room did A.T. tell Rocha how petitioner took off her clothes, uncrossed her legs, and sexually assaulted her. J.A. 12.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DEBORAH WATSON
Attorney

JUNE 1994